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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:	)	
	)	
Implementation of Section 703(e)	)	
of the Telecommunications Act of 1996	)	CS Docket No. 97-151
	)	
Amendment of the Commission's Rules	)	
and Policies Governing Pole Attachments	)	

OPPOSITION OF TIME WARNER CABLE TO THE PETITIONS FOR RECONSIDERATION

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SUMMARY

Time Warner Cable opposes the petitions for reconsideration of the Commission's decision in the Pole Attachment Order to apply the Section 224(d) pole attachment rate to attachments used by cable systems to provide Internet service. The Section 224(d) rate for cable systems offering Internet service is the only option consistent with the statute's text, the Commission's previous statements and the core policy objectives of the 1996 Act.

Time Warner Cable's Road Runner service offers consumers managed content, much like an Internet Service Provider. Therefore, the service does not meet the 1996 Act's definition of "telecommunications," which involves no change in the format or content of the transmitted information. Commission treatment of Internet service in the universal service context confirms that Internet service offered by cable systems is not a telecommunications service. Therefore, it makes no sense to apply the pole attachment rate specifically designated for "telecommunications" to cable systems offering the Time Warner service. An unregulated rate could not possibly reflect Congress' intent nor is it consistent with the text of the pole attachment provisions. Since Internet service is consistent with the 1996 Act's definition of "cable service" and flatly inconsistent with the Act's definition of "telecommunications", the rate formula in Section 224(d) is the only logical outcome for cable systems offering Internet service. The cornerstone policy goals of increased competition and broader access to the Internet present additional grounds for applying the Section 224(d) rate to cable systems furnishing Internet services.

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OPPOSITION OF TIME WARNER CABLE
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I. INTRODUCTION

Time Warner Cable, by its attorneys, and pursuant to Section 1.106(g) of the Commission's rules, hereby submits this Opposition to the Petitions for Reconsideration of the Pole Attachment Order[1] filed by various Petitioners.[2] Time Warner Cable ("Time Warner") is a division of Time Warner Entertainment Company, L.P. Time Warner owns and operates cable television systems nationwide. In the Pole Attachment Order, the Commission adopted rules implementing Section 703 of the Telecommunications Act of 1996,[3] which amended Section 224

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[1]In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments, CS Docket No. 97-151, Report and Order, FCC 98-20 (released Feb. 6, 1998) ("Pole Attachment Order").

[2]See Petitions for Clarification and Reconsideration of Bell Atlantic Telephone Company ("Bell Atlantic"), United States Telephone Association ("USTA"), Edison Electric Institute and UTC, the Telecommunications Association ("Edison/UTC"), SBC Communications Inc. ("SBC"), MCI Telecommunications Corporation ("MCI") (collectively "Petitioners").

[3]Pub. L. No. 104-104, 110 Stat. 56 (1996), codified at 47 U.S.C. § 224 ("1996 Act").

of the Communications Act of 1934. Section 224 directs the Commission to prescribe regulations ensuring that "rates, terms and conditions" assessed by pole attachment owners are "just" and "reasonable."[4]

The pole attachment provisions were originally enacted in 1978 to ensure that private owners of utility poles did not use their bottleneck control to prevent the development of the then-nascent cable television industry.[5] In 1996, Congress extended the Section 224 protections to telecommunications providers and made the access provisions for both cable operators and telecommunications carriers mandatory.[6] The Commission adopted a variety of rules implementing these access provisions in the Local Competition Order.[7] The 1996 amendments also limited the rate outlined in Section 224(d)(1)[8] to attachments used "solely to provide cable

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[4]Id. § 224(b)(1).

[5]S. Rep. 580. 95th Cong., 1st Sess. 19, 20 (1977) ("1977 Senate Report"), reprinted in 1978 U.S.C.C.A.N. 109, 121.

[6]47 U.S.C. § 224(f).

[7]First Report and Order, CC Docket No. 96-98 (Implementation of the Local Competition Provisions in the Telecommunications Act of 1996), 11 FCC Rcd 15499, 16058-107, paras. 1119-1240 (1996) ("Local Competition Order"), rev'd on other grounds, Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997), cert. granted sub nom AT&T Corp. V. Iowa Utilities Board, 66 U.S.L.W. 3387, 66 U.S.L.W. 3484, 66 U.S.L.W. 3490 (U.S. Jan. 26, 1998) (No. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099, 97-1411).

[8]Section 224(d)(1) limits the rate charged for cable attachments to the portion of operating expenses and capital costs incurred by the utility in owning and maintaining poles, conduits or rights-of-way equal to the portion of usable pole space occupied by the attacher. 47 U.S.C. § 224(d)(1).

service"[9] and defined a higher maximum rate for attachments carrying "telecommunications services."[10]

In the Pole Attachment Order, the Commission adopted a number of regulations pursuant to Section 224(e)(1), including a finding that the maximum rate that can be charged to a cable operator offering commingled traditional cable and Internet services is the 224(d)(1) rate as opposed to either the higher Section 224(e) rate or an unregulated rate.[11] Among other decisions reached by the Commission in the Pole Attachment Order, Petitioners urge reconsideration of this finding. Time Warner, a provider of cable television services including Internet access, urges the Commission to adhere to its conclusion in the Pole Attachment Order that cable system pole attachments are to be regulated under the Section 224(d) rate in such circumstances. The statute, legislative history, Commission precedent and policy goals of the 1996 Act overwhelmingly support the Commission's conclusion that cable systems providing Internet services are entitled to the 224(d)(1) rate.

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[9] Id. § 224(d)(3).

[10] Under subsection (e), the utility apportions the cost of providing other than usable space among attaching entities equal to two-thirds of the costs of such space that would be allocated if these costs were allocated equally among the attaching entities. The costs of usable space are apportioned among attaching entities according to the percentage of such space they use. Id. § 224(e)(2-3).

[11] Pole Attachment Order at paras. 30-35.

II. INTERNET ACCESS OFFERED BY CABLE SYSTEMS IS NOT A "TELECOMMUNICATIONS" SERVICE UNDER THE 1996 ACT

Internet service is not a "telecommunications"[12] service according to the statute's terms or under an analysis of its functions. Petitioners place great emphasis on Section 224(d)(3)'s limitation of the Section 224(d)(1) rate to attachments used "solely for cable services" and the absence of any similar limit on the telecommunications rate in Section 224(e) as evidence that "telecommunications" somehow encompasses a broad category of communications services.[13] Petitioners argue that the functions of cable operators' Internet services, such as email and Internet Protocol (IP) telephony, are so similar to telecommunications that they ought to be regulated under the higher Section 224(e) rate.[14]

Internet access provided via cable clearly cannot be classified as "telecommunications" because the statutory definition of that term precludes any manipulation of the form or content of information. By contrast, cable operators offering Internet access are the functional equivalents of Internet Service Providers (ISPs), who arrange and manipulate content. Internet access of the type provided by cable operators does not just involve mere transmission of information without change in its form or content but enables subscribers to interact with stored information and to access information provided by others. For example, Time Warner's Road Runner service

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[12]"Telecommunications" means "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43).

[13]Bell Atlantic at 2-4, SBC at 3, MCI at 5-6.

[14]SBC at 5-7, USTA at 4-6.

manipulates content and offers many of the same services as commercial ISPs such as America On Line as well as proprietary content that Time Warner has specifically developed for the service.[15]

Petitioners' citations to the legislative history of the 1996 Act provide no support for a conclusion that Congress intended to include Internet access offered over cable systems within the definition of "telecommunications." MCI contends that the Conference report to the 1996 Act "makes clear" that Congress rejected the idea of allowing cable operators providing anything other than traditional cable video services to receive the 224(d)(1) rate when it added subsection (e)(1).[16] However, the only distinction revealed in the cited passages is between "cable service" and "telecommunications services" -- the same distinction as in the text. Petitioners' citations to legislative history merely restate the question.

Further, the Commission has consistently rejected the notion that the provision of Internet service is a "telecommunications" service. For example, the Commission exempted ISPs from mandatory contributions to the Universal Service Fund required of telecommunication carriers in the 1997 Universal Service Order.[17] Subsequently, in the 1998 Universal Service Report, the Commission did not veer from this course, specifically declining to classify Internet access provided via cable systems and noting only that the Commission had found in the instant

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[15]Time Warner's Road Runner service can be found on the Internet at www.rr.com.

[16]MCI at 5-6.

[17]Federal State Joint Board on Universal Service, Report and Order, CC Docket No. 96-45, 12 FCC Rcd 8776, paras. 787-790 (1997) ("1997 Universal Service Order"). The Commission's Order flatly contradicts one petitioner's contention that the 1997 Universal Service Order was not dispositive as to whether Internet service could be classified as a telecommunications service. See Bell Atlantic at 2-4.

proceeding that pole attachments for such service were entitled to the 224(d) rate.[18] Even with respect to Internet Protocol (IP) telephony, the service most analogous to telecommunications, the 1998 Report declined to classify IP telephony as "telecommunications" for a variety of reasons, including the desire to avoid measures that might stifle the Internet's growth.[19] The Commission also refused to impose access charges on cable-provided Internet services, which would have been required had such services been classified as telecommunications.[20] While its precise regulatory classification may be uncertain, cable-provided Internet service clearly is not "telecommunications."

III. BECAUSE INTERNET IS NOT A "TELECOMMUNICATIONS" SERVICE, CABLE SYSTEMS PROVIDING INTERNET ACCESS SERVICE MUST CONTINUE TO PAY THE 224(d) RATE FOR POLE ATTACHMENTS

Internet services offered over cable systems definitively are not "telecommunications" and thus can not be subject to the Section 224(e) rate. The Commission is left either with the Section 224(d) rate or, as proposed by one petitioner, an unregulated rate. But the absurd implications of a rule that would allow pole owners to extract monopoly rents from cable operators who offer Internet access illustrate that to be a Hobson's choice. Therefore, the Commission reached the proper conclusion in the Pole Attachment Order when it decided to apply the Section 224(d) rate to cable systems that provide Internet service.

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[18]Federal-State Joint Board on Universal Service, Report to Congress, CC Docket No. 96-45, FCC 98-67 (rel. April 10, 1998) ("1998 Universal Service Report") at n.154.

[19]Id. at paras. 83-90.

[20]In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure, First Report and Order, CC Docket Nos. 96-262, 94-1, 91-213, 95-72, FCC 97-158 (rel. May 16, 1997), at para. 345.

According to one petitioner's argument, if cable Internet service is neither "telecommunications" nor a "cable service", then, under the terms of the statute, the Commission is without authority to regulate the pole attachment rates for any cable system offering Internet service.[21] The actual words of the statute preclude this possibility by directing the Commission to regulate the "rates terms and conditions for pole attachments,"[22] which are defined as "*any* attachment[s] by a cable television system to a pole ... owned or controlled by a utility."[23] Moreover, the policy implications of an unregulated rate show how untenable this position is. Petitioner would have the Commission believe that in amending section 224 in 1996, Congress intended to cap pole attachment rates only for traditional cable television services and telecommunications, leaving rates for all other existing and future services to the whims of pole owners. That scenario is not even remotely possible given Congress' concern since 1978 that pole owners would use their bottleneck control to stifle competing technologies.[24] Congress did not create such an anti-competitive incentive in the very same landmark law designed to foster competition. The absurd implications of petitioner's suggestion that the pole attachment rate for cable systems providing Internet service could go unregulated make it easy for the Commission to reject this reading of the statute.

If not a "telecommunications" service subject to the Section 224(e) rate nor a service causing pole attachment rates to be beyond the reach of the Commission's authority, the provision of Internet access service by cable systems should not alter the applicability of the Section 224(d)

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[21]SBC at 4-5.

[22]47 U.S.C. §224(b)(1).

[23]Id § 224(a)(4) (emphasis added).

[24]1977 Senate Report at 19-20.

rate to such systems. Although the Commission found it is unnecessary to decide whether Internet service offered over cable meets the statutory definition of a "cable service,"[25] even a cursory comparison of the definitions of those two terms under the 1996 Act shows that Internet access provided by cable systems is much closer to a "cable service" than "telecommunications." Congress amended the definition of "cable service" in 1996 by adding the phrase "or use" after "selection," clearly indicating that it intended to subsume interactive services within "cable service." Legislative history confirms this result; the Conference report to the 1996 Act explains that the intent of the amendment was to "reflect the evolution of cable to include interactive services ...."[26] The Act's "cable service" definition clearly can be read to incorporate Internet access service while the narrow definition of "telecommunications" excludes such service.

The Commission's conclusion that Internet service offered by cable systems is not "telecommunications" is consistent with the historically broad application of the Section 224(d) rate to many services provided over cable, aptly illustrated by the Heritage decision. In Heritage, the Commission held that cable operators providing nonvideo broadband communications services as well as traditional cable television service were entitled to the Section 224(d) rate.[27] Quite apart from Heritage's precedential value in light of the 1996 Act, the decision demonstrates that

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[25]Pole Attachment Order at para. 34. The 1996 Act defines "cable service" as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service." 47 U.S.C. § 522(6)(B).

[26]H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 169 (1996).

[27]Heritage Cablevision Associates of Dallas v. Texas Utilities Electric Co., 6 FCC Rcd 7099 (1991), aff'd Texas Utilities Electric Co. v. FCC, 977 F.2d 925 (D.C. Cir. 1993). See Pole Attachment Order at paras. 26-28.

before the addition of the 224(e) rate, the Commission has consistently applied 224(d) to attachments carrying more than merely traditional cable television services.

Further, given the policy continuities in the pole attachment provisions from 1978 through 1996, Heritage has continuing relevance as precedent.[28] The policy goals of nurturing a new technology and preventing pole owners from engaging in anti-competitive conduct are as relevant, if not more so, in the current deregulatory, pro-competitive framework of the post-1996 Act period as they were when Heritage was decided in 1991 or even when the pole attachment provisions were first enacted in 1978. The 1996 amendments, including its limitation of the Section 224(d) rate to attachments used "solely for cable service," are properly read as complementary to the 1978 provisions and not as superseding them. Congress inserted "solely"simply to limit the lower attachment rate to cable systems providing non-"telecommunications" services. The higher rate in Section 224(e) is for cable systems or anyone else providing "telecommunications" services. The logic and clarity of this reading of the statute should be obvious.

IV. CORE POLICIES OF THE COMMUNICATIONS ACT ARE SERVED BY THE APPLICATION OF THE LOWER RATE

In addition to the text of the statute, legislative history, and Commission precedent, the pervasive policy goals of increased competition and expanded access to communications services support the Commission's decision to apply the Section 224(d) rate to cable systems offering Internet access. It is indisputable that increased competition among providers of communications

[28]One petitioner maintains that because the decision predates the 1996 amendments, Heritage has little or no precedential value. SBC at n.12. The Commission was right to reject this interpretation. Pole Attachment Order at para. 30.

services is one of the cornerstone policy goals of the 1996 Act.[29] That goal resonates especially well in the case of Internet access, which is now dominated by Local Exchange Carriers (LECs). With their existing network and higher bandwidth capabilities, cable operators represent a potential source of competition to LECs that could provide substantial benefits to consumers of Internet services.

One petitioner posits that cable has an equal incentive to provide Internet services under either the Section 224(d) or the higher Section 224(e) rate.[30] This argument ignores basic economic incentives. The launch of Internet access by cable operators requires a significant financial investment. Obviously, allowing utilities to charge cable operators providing Internet access the much higher rate -- or to have no regulation of those rates at all -- would represent a substantial disincentive to cable operators seeking to compete for consumers of Internet services. As the Pole Attachment Order notes, it would indeed be a perverse policy result if the Commission's regulations served to deter cable operators from offering Internet services.[31]

Another petitioner actually seeks refuge in the Act's competition theme by arguing that applying the lower rate to cable systems providing Internet service forces incumbent local exchange carriers ("ILECs"), who, under the 1996 Act, must allow competitors on their own poles but enjoy no mandatory access rights as telecommunications carriers on other utility poles,[32] to "subsidize" cable operators' Internet access services.[33] This oft-repeated complaint from pole

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[29]Preamble to the 1996 Act.

[30]SBC at 4.

[31]Pole Attachment Order at para. 32.

[32]See id. at para. 5, citing 47 U.S.C. § 224(a)(5).

[33]Bell Atlantic at 6.

owners ignores the fact that even the Section 224(d) rate benefits utilities' ratepayers. If a utility must erect a pole in order to construct its plant, and no other entity attaches to the pole, its ratepayers pay the entire cost of installing and maintaining that pole in place. By adding cable operators' attachments, the pole owner collects fees which alleviate the burden of these costs on the utility's ratepayers. In fact, because Section 224(d) requires that the cable operator pay a percentage of the total costs of the installation and maintenance of the pole,[34] as well as the incremental costs of their presence on the pole, the "subsidy" actually runs from cable customers to the utility's ratepayers. Petitioner's implication that cable operators pay even more than these costs reveals a curious interpretation of the concept of "fair competition."

A related core goal of the 1996 Act is the expansion of access to all communications services.[35] Again, that goal is particularly relevant to the Internet, which, while expanding, still serves only a small minority of Americans[36] and is plagued by usage and technological demands limiting its performance.[37] As noted, cable is well-positioned to realize Congress' goal of increased access to the Internet. Cable currently passes over ninety-six percent of American homes,[38] and its higher bandwidth offers consumers faster service than Internet service provided

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[34]For example, if additional guying or anchoring is needed to support the cable attachments, or if a taller or stronger pole must be installed, the cable operator pays for all of those costs.47 U.S.C. § 224(d)(1).

[35]Preamble to the 1996 Act.

[36]1997 Universal Service Order at n.154 (citing Intelliquest study estimating U.S. on-line population at 47 million people).

[37]In the Matter of the Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Fourth Annual Report, CS Docket No. 97-141 (rel. January 13, 1998) para. 98 ("1997 Competition Report").

[38]Id. at para. 14.

by other carriers.[39] Indeed, cable's potential to offer superior service to consumers suggests that Petitioners' opposition may stem as much from their own economic concerns as any substantive disagreement with the Commission's rationale in the Pole Attachment Order. As the original pole attachment amendments fostered the development of the then-developing cable television industry,[40] the Commission's decision to apply the 224(d) rate to attachments used by cable systems to provide Internet service ensures wider consumer access to the Internet and better service.

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[39]A recent study indicates that nearly two-thirds of all homes currently connected o the Internet want faster service. Ann Zeiger, Fast Data Services Aimed at Mass Market, Internet Week, January 5, 1998, at T01. Time Warner's Road Runner service provides service over 100 times faster than traditional service offered by telephone companies.

[40]1977 Senate Report at 19, 20.

V. CONCLUSION

Petitioners subject the statute and legislative history of the 1996 Act and Commission precedent to significant manipulation in search of support for their position that pole attachments for cable systems offering Internet access should be regulated either at the Section 224(e)(1) rate for "telecommunications" or should be unregulated entirely. However, the statute's text and legislative history, Commission precedent and the 1996 Act's policies overwhelmingly show that:

(1) Internet services are not "telecommunications" and thus can not be subject to the Section 224(e) rate.

(2) An unregulated rate for cable systems providing Internet service flatly contradicts the statute and the entire rationale for limits on pole attachment rates.

(3) Thus, Section 224(d) is the only rate that logically can apply to cable systems offering Internet service.

Time Warner therefore respectfully urges the Commission to adhere to its conclusion in the Pole Attachment Order that the maximum rate for pole attachments by cable systems offering Internet service is the Section 224(d) rate.

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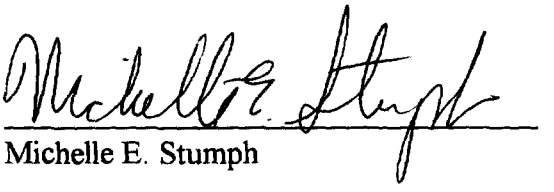
CERTIFICATE OF SERVICE

I, Michelle E. Stumph, hereby certify that the foregoing Opposition to the Petitions for Reconsideration in CS Docket No. 97-151 has been filed this 12th day of May, 1998 to the attached matrix.



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